

Marquette Law Review

Volume 98

Issue 1 *Symposium: Judicial Assistants or Junior*

*Judges: The Hiring, Utilization, and Influence of Law
Clerks*

Article 11

The Future of Federal Law Clerk Hiring

Aaron L. Nielson

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Aaron L. Nielson, *The Future of Federal Law Clerk Hiring*, 98 Marq. L. Rev. 181 (2014).

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THE FUTURE OF FEDERAL LAW CLERK HIRING

AARON L. NIELSON*

The market for federal law clerks has been upended. Beginning in 2003, the Federal Judges Law Clerk Hiring Plan was implemented to regulate clerkship hiring. According to the Plan, a judge could not interview or hire a potential law clerk before the beginning of the applicant's third year of law school. The Plan, however, never worked well, constantly got worse, and has now officially collapsed. Across the country, clerkship hiring once again regularly occurs during the second year of law school.

This Article addresses the rise and inevitable fall of the Plan. In particular, it submits that the Plan never had a realistic chance of success because coordinated action in a competitive market is difficult to maintain, especially without an effective enforcement mechanism to punish noncompliance. Here, the Plan collapsed because its enforcement mechanism was far too weak. And the reason why the Plan did not have a more effective enforcement mechanism was no accident: any mechanism that could work would require judges to give up too much.

Against that backdrop, this Article explains what clerkship hiring will likely look like in the future. Importantly, given the steep costs of an effective enforcement mechanism, this Article contends that it is unlikely that a new hiring plan will be adopted. This is especially true because modern trends are already beginning to mitigate the concerns associated with an unregulated clerkship market.

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I. INTRODUCTION

The perennial issue of what a law clerk's role ought to be is not going away anytime soon. The more interesting question, however, may not be *what* clerks do, but rather *how* they are hired. In particular, the market for federal judicial law clerks has been upended. In 2003, the Federal Judges Law Clerk Hiring Plan (the Plan) was instituted to regulate clerkship hiring.¹ The Plan's purpose was to push interviewing back until the fall of a student's 3L year.² This was no small goal. Groups of judges for decades have bemoaned the unregulated clerkship market and strove for something better.³ The Plan—designed to address “market failures”—represented the long-awaited fruit of that striving.⁴

The Plan, however, has fallen apart. Last year, the U.S. Court of Appeals for the D.C. Circuit withdrew from the Plan and began openly interviewing 2L students.⁵ After that, everything unraveled quickly, with judges across the country following the D.C. Circuit's lead—that is, if they were not already hiring 2Ls, as many were. Then, on November 4, 2013, the Plan formally collapsed. That day, the federal judiciary's website announced that 2Ls could submit applications through the Online System for Clerkship Application and Review (OSCAR).⁶ In short, the unregulated market is back.

For many, this regulatory failure is frustrating. But it was no surprise. Every hiring season it became increasingly obvious that the problems of the unregulated market were reemerging in the “regulated” market, but with a particularly cruel twist. Not only did the unregulated

1. Aaron L. Nielson, *Reflections on the End of the Federal Law Clerk Hiring Plan*, 112 MICH. L. REV. FIRST IMPRESSIONS 22, 23 (2013), <http://www.michiganlawreview.org/assets/fi/112/Nielson.pdf>, archived at <http://perma.cc/9Q5E-PF3C>; see also Christopher Avery, Christine Jolls, Richard A. Posner & Alvin E. Roth, *The New Market for Federal Judicial Law Clerks*, 74 U. CHI. L. REV. 447, 449–50 (2007).

2. Nielson, *supra* note 1, at 23.

3. *Id.*

4. *E.g.*, Avery et al., *supra* note 1, at 454 & n.33.

5. See, e.g., Nielson, *supra* note 1, at 22; see also *Notice Regarding Law Clerk Hiring by D.C. Circuit Judges for the 2014–2015 and Subsequent Terms*, U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT, <http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Human+Resources+-+Law+Clerk+Hiring> (last visited Nov. 2, 2014) [hereinafter *Notice Regarding Law Clerk Hiring*], archived at <http://perma.cc/B96J-2JVJ>.

6. See *OSCAR De-links from the Hiring Plan*, OSCAR (Nov. 4, 2013, 8:55 AM), https://oscar.uscourts.gov/blog_post/_1/21/OSCAR_De-links_from_the_Hiring_Plan, archived at <http://perma.cc/8SRD-LADH>.

market reassert itself, it did so under cover of darkness, creating real unfairness. To get a clerkship, students were well-served by applying early, notwithstanding the Plan's rules to the contrary. Naive applicants were often out of luck. No one thought *that* was a good thing. The Plan, accordingly, was abandoned. After all, if there can't be order, there can at least be transparency.

Now that the Plan is gone, what does the future hold? To answer that question, it is essential to understand why the Plan collapsed. This Article addresses the Plan's fatal flaw: maintaining collective action is difficult. This key insight of antitrust economics is especially true where large numbers of heterogeneous participants compete against each other in an opaque marketplace—in other words, in a market like the federal judiciary. In such markets, a powerful enforcement mechanism is necessary to preserve collective action, but powerful enforcement mechanisms are not cheap. The Plan failed because its enforcement mechanisms—primarily OSCAR's automated application process, augmented by buy-in from law schools and the anchoring role of the D.C. Circuit—were not sturdy enough to withstand the competitive pressures put on them. And it was no accident that a more powerful enforcement mechanism was not in place. More powerful mechanisms have been proposed, but they have not been adopted because, from the perspective of judges, they cost too much relative to their benefits.

After explaining this structural reality of the clerkship marketplace, this Article sets forth the current state of clerkship hiring and considers the future. Given just how much it would take to create and maintain an effective enforcement mechanism, the prospects of a new plan—and certainly a *successful* new plan—are grim. In particular, to justify the steep cost of an enforcement mechanism that could actually work, the benefits of a new plan would have to go much deeper than simply bringing order to the market. Those benefits have already been weighed and found wanting.⁷

But there might be other benefits of regulation that have not yet been considered. For example, some data—albeit inconclusive—suggests that women law students on average do less well during the first year of law school but that the divergence dissipates as school continues.⁸ If so, then making clerk hiring more dependent on 1L

7. See, e.g., George L. Priest, *Reexamining the Market for Judicial Clerks and Other Assortative Matching Markets*, 22 YALE J. ON REG. 123 (2005).

8. See *infra* note 185.

grades will have an asymmetric impact on the gender of clerks—an obvious problem. Similarly, the unregulated market may disproportionately benefit more prestigious law schools; the earlier hiring occurs, the less data a judge has about an individual applicant, making the “brand” value of the applicant’s school a weightier signal of quality. This too may have systemic effects: for instance, if graduates of higher-ranked law schools produce different substantive outcomes as clerks than graduates of lower-ranked schools, which seems implausible, or, perhaps more likely, if it means that clerks are less likely to continue their careers in the communities where they clerk.

Nevertheless, even if these potential unexplored benefits are real, it still would not necessarily follow that a new plan should be created. There may be alternatives to regulation that achieve the same benefits at a lower cost. For instance, the modern trend of hiring more graduates as clerks—as opposed to current students—may solve or at least mitigate the problem of hiring clerks too early. At the same time, modern technology may make the market more transparent, thus discouraging distasteful hiring behavior.

This Article proceeds as follows. Part II sets forth why the Plan was created, what problems it was supposed to solve, and the chronology of the Plan’s collapse. Part III then addresses the key reason why the Plan failed: an enforcement mechanism powerful enough to prevent unraveling in a market like the federal judiciary would be prohibitively costly in light of the potential benefits. Part IV, in turn, describes the current state of the clerkship market. Lastly, Part V considers the future of law clerk hiring.

II. THE CREATION AND COLLAPSE OF THE PLAN

The character of the clerkship market is oft discussed—perhaps too oft.⁹ Nevertheless, the facts bear repeating at least once more. One cannot predict the future of clerkship hiring without appreciating the dynamic driving the action. In any event, we often need not be taught as

9. See, e.g., Paul H. Edelman, *Law Clerks, Law Reviews & Some Modest Proposals*, 7 GREEN BAG 2D 335, 335 (2004) (criticizing, with tongue-partially-in-cheek, the volume of literature on the clerkship market as reflecting “the self-absorption of legal academics”). There is truth to this charge. Nevertheless, clerkship hiring can illustrate more transcendent lessons about regulatory design. See Nielson, *supra* note 1, at 22. If it takes a market that academics and judges are already familiar with to teach those lessons, so be it.

much as reminded.

Clerkships are valuable. This means that clerkship hiring is competitive for applicants who want to be hired by the best, most prestigious judges; for judges, who want to hire the best, most able clerks; and for law schools that compete against each other in the rankings. Because there are not enough clerkships for every student who wants one, and because there are not enough perceived top students for every judge,¹⁰ competition inevitably results.

Competition, however, is messy.¹¹ It promises prestige for innovators, portends punishment for those who fall behind, and makes the “quiet life” hard to obtain.¹² For this reason, competition is not always appreciated—sometimes by those who benefit from an anti-competitive status quo,¹³ but also by those who feel that at least some activities are ill-served by the constant elbow-jostling that competition demands. Maurice E. Stucke, for instance, asks whether “[p]arents”

10. To be sure, some believe the pool of quality applicants is so deep that this entire issue is silly. See, e.g., Ronald K.L. Collins, *More on the Law Clerk Hiring Process—An Interview with Federal Judge Robert Lasnik*, CONCURRING OPINIONS (June 16, 2014), <http://www.concurringopinions.com/archives/2014/06/more-on-the-law-clerk-hiring-process-an-interview-with-federal-judge-robert-lasnik.html#more-87353>, archived at <http://perma.cc/5QM7-SNBY> (“It is nonsense to think that there is such a limited pool of superstar students that we all have to compete for or judges will be saddled with inferior clerks. As I said, I hire merely months before the clerkship begins and I have had some fabulous clerks who have become tremendous lawyers.”). It is undoubtedly true that capable clerks can always be found. Nevertheless, many judges compete vigorously because they believe they can find better clerks by doing so. See, e.g., Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707, 1708 (1991). Perhaps both sides are right; different judges want different things from their clerks. See, e.g., Patricia M. Wald, *Selecting Law Clerks*, 89 MICH. L. REV. 152, 153 (1990).

11. Cf. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 81–86 (Harper & Row 1976) (1942) (discussing the idea of “creative destruction”); ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 80–88 (1978) (explaining how competition can topple previously stable markets).

12. See R.H. Coase, *Some Notes on Monopoly Price*, 5 REV. ECON. STUD. 17, 30 (1937) (“The best of all monopoly profits is a quiet life! . . . The quiet life which a monopoly allows will therefore probably result in a slowing down of the rate of progress.” (quoting J.R. Hicks, *Annual Survey of Economic Theory: The Theory of Monopoly*, 3 ECONOMETRICA 1, 8 (1935))); Priest, *supra* note 7, at 176 (same quote); see also Joseph M. Alioto, *Antitrust on the Rebound*, 39 SANTA CLARA L. REV. 809, 809 (1999) (“Monopolists hate competition. They suppress it. They lobby against it. They know that competition in the marketplace creates too much uncertainty—they never know what the other guy is going to do. . . . They are terrified that some newcomer may unseat them.”).

13. Cf. 15 U.S.C. § 2 (2012) (“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . . shall be deemed guilty of a felony . . .”).

should really “foster competition among their children for their affection,” or “[p]arishioners” compete “for better pews and parking spaces.”¹⁴ At the same time, of course, this distaste for competition can be exploited, perhaps subconsciously, by those who want to use it for the less-than-noble purpose of hamstringing competitors.¹⁵

The battle over how clerkship hiring ought to occur mirrors this broader conversation about the value and drawbacks of competition generally. This is unsurprising: competition—with its attendant disorder—is everywhere when it comes to the clerkship market. At every step in the process, competition abounds. Some judges accept this competition as inevitable or at least the best option reasonably available;¹⁶ others go further and even seem to enjoy the disorder that competition causes;¹⁷ still others, however, bemoan the commotion and want competition to be restrained.¹⁸ Thus, the question is whether something ought—and can—be done to generate greater order?

This section of the Article sets out the background of the discussion:

14. Maurice E. Stucke, *Is Competition Always Good?*, 1 J. ANTITRUST ENFORCEMENT 162, 168 (2013); *see also* MICHAEL J. SANDEL, WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS 8–9 (2012) (raising a similar point that some activities are ill-served by markets). *But see* Gary Becker, *What Limits to Using Money Prices to Buy and Sell?*, BECKER-POSNER BLOG (Oct. 21, 2012, 7:26 PM), <http://www.becker-posner-blog.com/2012/10/what-limits-to-using-money-prices-to-buy-and-sell-becker.html>, *archived at* <http://perma.cc/EM5H-PLQV> (“I have not attempted to draw a sharp line between where prices and markets should be used and where they should not be. Nor do I deny that for some activities the cost of using money prices would exceed the gains. I do believe, however, that in the US and other economies, the bigger problem is not excessive use of prices and markets but insufficient use.”).

15. *Cf.* Bruce Yandle, *Bootleggers and Baptists—The Education of a Regulatory Economist*, REGULATION, May–June 1983, at 12, 13 (explaining how those who disliked alcohol were supported by bootleggers who just wanted less competition); Kozinski, *supra* note 10, at 1719 (explaining how a “neutral” limit on competition can benefit some judges at the expense of others).

16. *See, e.g.*, Howard Bashman, *20 Questions for Circuit Judge Jerry E. Smith of the U.S. Court of Appeals for the Fifth Circuit*, HOW APPEALING (Feb. 28, 2003, 8:27 AM), http://howappealing.law.com/20q/2003_02_01_20q-appellateblog_archive.html, *archived at* <http://perma.cc/L6ET-RU6Z> (“The current hiring plan . . . will fail, sooner or later, because a ‘one size fits all’ scheme isn’t suited to the diverse body of federal judges in the various circuits.”).

17. *See, e.g.*, Kozinski, *supra* note 10, 1707–08 (“The Shangri-la that many of my colleagues envision—the ‘orderly process that comports with the seriousness of the job and the dignity of the relationship between judge and clerk’—is neither attainable nor desirable.” (quoting Wald, *supra* note 10, at 152)).

18. *See, e.g.*, Wald, *supra* note 10, at 163 (“Maybe judges have to look harder . . . to see if the gamesmanship at which a few excel is really worth the angst and perceptions of unseemly competition that now cloud the clerkship selection process.”).

why clerkships are valuable, what hiring looks like in an unregulated market, why the outcomes of an unregulated market have been attacked, how the Hiring Plan worked, and the steps of its collapse.

A. The Value of Clerkships

To understand the rise and fall of the Federal Judges Law Clerk Hiring Plan, it is first necessary to appreciate *why* the clerkship market is so competitive. The reason is straightforward: clerkships matter. For students, clerkships are coveted because they are both valuable (clerks learn a lot of law from a seasoned mentor and gain better career options)¹⁹ and rare (hundreds of students apply for a judge's handful of slots).²⁰ And for judges, clerkships are critical because clerks do important work that judges do not have the capacity to do by themselves (a good clerk can help carry a portion of the judge's load)²¹ and because many judges enjoy the mentoring relationship.²² Schools also care because their reputation is often tied, at least in part, to their ability to place clerks,²³ particularly in prestigious clerkships.²⁴ Schools know that

19. See, e.g., Brad Snyder, *The Judicial Genealogy (and Mythology) of John Roberts: Clerkships from Gray to Brandeis to Friendly to Roberts*, 71 OHIO ST. L.J. 1149, 1155 (2010) ("Judges play multiple professional roles in the lives of their clerks: as exemplars of judicial ethics, craftsmanship, and decision-making; as mentors and career advisers; and as role models and sources of inspiration long after judges have retired or died."); Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1, 51–52 (2007) (explaining career opportunities clerkships enable).

20. See, e.g., Ronald K.L. Collins, *The Law Clerk Hiring Process—An Interview with Federal Judge Thomas Ambro*, CONCURRING OPINIONS (Mar. 31, 2014), <http://www.concurringopinions.com/archives/2014/03/the-law-clerk-hiring-process-an-interview-with-federal-judge-thomas-ambro.html>, archived at <http://perma.cc/QY9K-AE4S> ("When the hiring plan was in effect and used widely, I received over 800 applications per term.").

21. See, e.g., Kozinski, *supra* note 10, at 1708.

22. See, e.g., *id.* ("The relationship between judge and clerk is professional only in part; it is also a close human relationship, one that endures long after the clerkship ends. By accepting a judge's clerkship offer, a young lawyer becomes part of the judge's extended family, a disciple, an ally, quite possibly a friend.").

23. See, e.g., Robert Morse, *Which Law Schools' Grads Get the Most Judicial Clerkships?*, U.S. NEWS & WORLD REP. (April 11, 2013, 10:37 AM), <http://www.usnews.com/education/blogs/college-rankings-blog/2013/04/11/which-law-schools-grads-get-the-most-judicial-clerkships>, archived at <http://perma.cc/WST7-2WVM>.

24. See, e.g., *The ATL Top 50 Law School Rankings 2014*, ABOVE THE LAW, <http://abovethelaw.com/careers/2014-law-school-rankings/> (last visited Nov. 2, 2014), archived at <http://perma.cc/66LA-HJ6D> ("We also acknowledge 'prestige' plays an outsized role in the legal profession. Our methodology rewards schools for producing Supreme Court clerks and federal clerks because the market rewards people who get those jobs with money and prestige. Don't hate us, we're just the messengers.").

potential students and alumni are interested in how a school is doing in the clerkship race. In this era of law-of-the-jungle competition between law schools, those voices carry a lot of weight.

Students thus compete vigorously for clerkships. They apply broadly and hope that a judge will call. And not just any judge—students yearn for a “prestigious” judge. Students know that judges are not “fungible”;²⁵ judges have different personalities, sit in different places, and offer different post-clerkship employment prospects.²⁶ Those students looking to clerk, accordingly, do all they can to stand out. Merely being good is not good enough. With competition this cutthroat, the goal is to dazzle.

At the same time, many judges are also competing. Just as judges are not fungible, neither are clerkship applicants. Judges want dazzlers—clerks who are smart, write well, get along with others, and will reflect well on the judge going forward.²⁷ Judges (and current clerks) thus scour the hundreds of clerkship applications in the inbox. They also make phone calls to recommenders and do what they can to be around potential clerks to get a better sense of the applicant pool. For instance, some “upstart” judges—and even sometimes well-established heavyweights—make appearances at law schools and call on networks of former clerks to, at least in part, find good clerks and build and reinforce the judge’s “brand.”²⁸ A good reputation, after all, is always a good thing—including in clerkship hiring. All the while, judges know that many other judges are doing the exact same thing.

Law schools are also part of the rough-and-tumble. They trumpet, for example, when one of their students receives a Supreme Court clerkship.²⁹ This should not be a surprise. Law schools care about the clerkship prospects of students, both because faculty care about students and because law schools know that clerkship placement matters to the

25. Nielson, *supra* note 1, at 22.

26. See, e.g., Kozinski, *supra* note 10, at 1709.

27. See, e.g., *id.* at 1708 (“There are *substantial* differences among clerks. The difference between having clerks that are merely good and ones that are awesome can be the difference between a bad year and a wonderful one. . . . I have been fortunate in having many clerks who were superstars, but have had some who were not. I prefer the former, as do my colleagues, and that’s much of what the competition is about.”).

28. Cf. *id.* at 1719 (explaining the challenge for new judges to compete for clerks).

29. See, e.g., David Lat, *Supreme Court Clerk Hiring Watch: Is October Term 2014 Filled Up? Plus a List of Top Feeder Judges*, ABOVE THE LAW (May 5, 2014, 5:34 PM), <http://abovethelaw.com/2014/05/supreme-court-clerk-hiring-watch-is-october-term-2014-filled-up-plus-a-list-of-top-feeder-judges/>, archived at <http://perma.cc/A2C3-ZV7C>.

school going forward. Law schools thus create “clerkship committees” which both help prepare students to compete for clerkships and actively “shop” potential clerks to judges. The institutional interests of law schools are particularly interesting, moreover, because of the time horizon. An individual clerkship applicant only cares about placing one clerk: him or herself. Not so with law schools; schools care not only about one applicant or even one year of applicants. Instead, they are focused on building and maintaining long-term connections with judges, and that requires maintaining credibility. This means that sometimes schools do not push a student as much as that student would like. Similarly, even within a law school faculty, there may be shades of competition. As Judge Kozinski has argued, it is not a bad thing to be a “feeder professor” in terms of hiring talented research assistants.³⁰

In short, it’s competition all the way down. Students compete, judges compete, and law schools compete. Because clerkships are valuable and scarce, competition is inevitable. And that means a market.

B. What Clerkship Hiring Looks Like in an Unregulated Market

This dynamic—competition among applying students to attract judges and competition among judges to attract students, with law schools always hovering about—creates a chaotic marketplace. At bottom, this chaos is the motivating force behind the various attempts to regulate clerkship hiring. Because clerkships are valuable, applicants try to get a leg up on other applicants, while judges try to outmaneuver each other. Predictably, disorder results.

In particular, unregulated clerkship competition leads to at least two main outcomes: (1) “early” hiring during the 2L year can produce less-than-ideal matches as applicants who would prefer certain judges and judges who would prefer certain applicants do not find each other, and (2) both applicants and judges engage in behavior branded as unsavory. Each of these outcomes is used to justify regulation.

1. Hiring in the Second Year of Law School

The most obvious characteristic of an unregulated clerkship market is that many judges hire clerks in the 2L year.³¹ As well explained in the

30. See Kozinski, *supra* note 10, at 1729.

31. See Nielson, *supra* note 1, at 23.

leading article on the subject, the Harvard-Chicago Study, the reason why this occurs is straightforward:

Any time that is set will tend to “unravel” because judges have an incentive to “jump the gun,” hiring slightly earlier than their competitors, to get the pick of the candidates. Students have strong reasons to accept early offers from judges, among other things because they will not know what their other options may be, and also because it is, quite simply, difficult and uncomfortable to hold off a federal judge.³²

Specifically, this process occurs because judges want the best clerks and applicants often take the first offer they receive.³³ This means that an applicant may (and often does) accept an offer from a less-preferred judge if that offer comes first.³⁴ Although controversial,³⁵ a “Just Say Yes” attitude can be rational. In the clerkship market, the field is heavily tilted in favor of the bench because there are many applicants and few judges. Even very good applicants, therefore, have reason to wonder whether they are really at the top of the list for their favorite judges. So if another judge—not the favorite, but still good—comes along and makes an offer, a student is tempted to accept it.³⁶ Law school is a stressful place; it is a happy day when a student knows what

32. Christopher Avery, Christine Jolls, Richard A. Posner & Alvin E. Roth, *The Market for Federal Judicial Law Clerks*, 68 U. CHI. L. REV. 793, 795 (2001) (footnote omitted).

33. *Id.*

34. *See id.*

35. Compare Karen Sloan, *Clerkship Scramble: The System for Placing Them with Federal Judges is Breaking Down*, NAT'L L.J. (Oct. 18, 2010), <http://www.nationallawjournal.com/id=1202473438279/Clerkshipscramble#ixzz35D4VxY7>, archived at <http://perma.cc/3PYA-SGSB> (observing that “exploding offers” may be detrimental to students and judges), with Avery et al., *supra* note 32, at 795 (explaining a judge’s motivations to make early offers with short acceptance timeframes).

36. Early hiring also need not be all bad from a pedagogical perspective. Students may be more willing to take difficult courses in law school if they know that their class rank is less important. In a competitive world, students, as a rule, are strategic in picking classes, especially students near the top of the class. *See, e.g.*, David M. Moss, *The Hidden Curriculum of Legal Education: Toward a Holistic Model for Reform*, 2013 J. DISP. RESOL. 19, 21–22 (2013). (Whether students *ought* to behave this way is a separate question.) After a clerkship is in the bag, however, the benefits of such strategic class picking are diminished—the student already has the door-opening credential. He or she can thus breathe a bit easier and feel more comfortable taking classes where success is not as certain. To be sure, some students with a clerkship in hand may “check out” of law school, at least somewhat. *But see* Avery et al., *supra* note 32, at 803. Pedagogically, this is less than ideal. Even for such students, there is at least something to be said, from the student’s perspective, for peace of mind.

she will be doing after graduation. Even if the clerkship offer comes from a less-than-favorite judge, the certainty that comes from accepting a clerkship is valuable.³⁷ Recognizing this state of play, judges, looking to hire whom they prefer, often try to hire a bit earlier than other judges.³⁸ This naturally leads to a competitive response. Judges who lose out on clerks due to such strategic behavior have an incentive to also begin hiring earlier, leapfrogging the initial group of early-movers.³⁹ This prompts earlier hiring still in response, and so on. The end result is that hiring moves up.

There appears to be a natural limit to this process, however. Hiring usually does not occur until after the first year of law school, and perhaps not until after the first semester of the second year of law school.⁴⁰ The reason for this is equally obvious: “[T]he risk of a ‘dud’ [is] simply too high.”⁴¹ It takes a certain amount of information for a judge to confidently predict whether an applicant will be a good clerk. This means that the earlier a judge hires, the riskier the hire is—especially because undergraduate grades by themselves are not a great predictor of legal aptitude,⁴² nor is a high LSAT score as powerful a predictor as actual law school grades.⁴³ Hence, notwithstanding the alarm some may have that an unregulated clerkship market will push clerkship applications and selections to the second half of the 1L year, the market equilibrium appears to be sometime in the 2L year,⁴⁴ particularly for court of appeals judges.⁴⁵

37. See, e.g., Priest, *supra* note 7, at 162.

38. Avery et al., *supra* note 32, at 795–96.

39. See *id.*

40. See, e.g., Kozinski, *supra* note 10, at 1710.

41. Nielson, *supra* note 1, at 26.

42. See, e.g., Keith A. Kaufman, V. Holland LaSalle-Ricci, Carol R. Glass & Diane B. Arnkoff, *Passing the Bar Exam: Psychological, Educational, and Demographic Predictors of Success*, 57 J. LEGAL EDUC. 205, 214 (2007) (explaining that bar passage rates are not especially well-predicted by undergraduate grades).

43. See, e.g., *id.* at 217–18 (“Analyses of the educational variables indicate that those who passed the bar exam on their initial attempt had significantly better LGPAs, class ranks, and LSAT scores than did those who failed, with regression analyses showing LGPA to be a stronger predictor of bar exam performance than LSAT. . . . [A study shows] that LGPA explains around 50 percent of the variance in bar exam scores compared to 15 percent for the LSAT.” (emphasis added) (citing Stephen P. Klein & Roger Bolus, *The Size and Source of Differences in Bar Exam Passing Rates Among Racial and Ethnic Groups*, BAR EXAMINER, Nov. 1997, at 8, 13)).

44. This assessment is based on a great deal of anecdotal information. I am fairly confident that Judge Kozinski is right that a natural time for hiring is during the 2L year,

2. Disorderly Behavior

The clerkship market is also characterized by competitive behavior—and that means disorder. The stories are legion. On the applicant side, for instance, some students refuse to answer their phones.⁴⁶ It is hard to schedule interviews in a calculated way if a less favorite judge is on the other end of the line. So applicants let calls go to voicemail. Similarly, applicants, not unlike academics trying to place law review articles, may also try to trade up clerkship offers.⁴⁷ At the end of the day, however, the tools available to applicants are limited; because there are lots of applicants and few judges, there is only so much leverage a student can have. As explained above, there is a reason that applicants almost always accept an offer when made.⁴⁸

More interestingly, judges have tricks of their own.⁴⁹ Judges, for instance, sometimes make so-called “exploding” offers; if the applicant wants the job, she has to accept on the spot or the offer is gone forever.⁵⁰

though it may be closer to the beginning of the year than the end of it. *See* Kozinski *supra* note 10, at 1710–11. For some judges, it may be earlier still.

45. District court judges may have a different, later hiring schedule. *See infra* note 142.

46. *See, e.g.*, Alison Monahan, *Judicial Clerkships: What You Need to Know About Scheduling Clerkship Interviews*, THE GIRL’S GUIDE TO LAW SCHOOL (Aug. 19, 2011), <http://thegirlsguidetolawschool.com/08/what-you-need-to-know-about-scheduling-judicial-clerkship-interviews/>, archived at <http://perma.cc/7EK4-CVNE> (“The most critical piece of advice for managing your interview schedule is simple: do not answer the phone!” (emphasis omitted)).

47. *Cf.* Edelman, *supra* note 9, at 336.

48. Professor Edelman wonders why clerkship applicants almost always say yes to clerkship offers. *See id.* at 341–42 (speculating that “the ‘Just Say ‘Yes’” norm . . . is founded in some exotic judge-worship cult or on some inchoate sense that if a judge were to be turned down the disrespect thus displayed would be communicated to the rest of the judiciary”); *see also* Kozinski, *supra* note 10, at 1726 (same point). As discussed above, the answer may be more straightforward: students know the ratio of judges to applicants is not in their favor. Moreover, the fact that it is hard to get a clerkship further encourages acceptance because many applicants have been assisted by faculty members or others who have called in favors to help the student with particular judges (indeed, some sorting happens before applications are even submitted as students self-select away or toward certain judges). It can be hard to say no after that. The underlying driver, however, is scarcity; the reason why contacting a judge even counts as calling in a favor is because judges have leverage. For the very best applicants, it may make sense to be more selective. But for everyone else, it is often reasonable that an applicant takes what comes and thanks his or her lucky stars.

49. I should note I have not personally witnessed any of this behavior. None of the judges I clerked for acted this way. *See, e.g.*, Bashman, *supra* note 16.

50. *See, e.g.*, Catherine Rampell, *Judges Compete for Law Clerks on Lawless Terrain*, N.Y. TIMES, Sept. 24, 2011, at B1 (noting that judges sometimes make exploding offers that candidates must “accept or decline . . . on the spot (and it’s a ‘Godfather’-style offer: one they can’t really refuse)”; Edward S. Adams, *A Market-Based Solution to the Judicial Clerkship*

Judges may also make vanishing offers; an offer is extended, the applicant is given time to think about it, but before the applicant can respond, the position is offered to someone else.⁵¹ Judges, too, may schedule interviews with applicants knowing that the odds are good (but not certain) that the position will be gone before the clerkship applicant even has a chance to interview.⁵² Given that applicants are traveling on their own dime, this practice is particularly nasty. Finally, judges might speak ill of other judges to try to dissuade applicants from accepting competing offers.⁵³ Sharing information, of course, is not a bad thing—that is, unless the information is false or distorted.⁵⁴

Making matters more chaotic, no one knows for sure what exactly the hiring process will be like in any particular year. The market evolves.⁵⁵ Judges respond to each other's hiring decisions, meaning the market can change in unpredictable ways.⁵⁶ Given the competing pressures, it is unsurprising that the market has been derided as “madcap,” “surreal,” and “ludicrous”—a world “in which the law of the jungle reigns and badmouthing, spying and even poaching among judges is rife.”⁵⁷ Many of those adjectives are overstatements, but the overall gist is true enough. It is messy.

C. *Unsuccessful Efforts to Regulate Clerkship Hiring*

Many judges find this chaos distasteful—they believe that an unregulated clerkship market is both inefficient and injudicious.⁵⁸ These judges condemn the unregulated market as inefficient because clerks are hired too early. Hiring a student in the 2L year means that decisions are based on incomplete data, sometimes only a single year of law school grades.⁵⁹ Relatedly, “mismatches” occur; applicants sometimes would

Selection Process, 59 MD. L. REV. 129, 133 (2000) (same point).

51. See, e.g., Adams, *supra* note 50, at 133.

52. See, e.g., Priest *supra* note 7, at 201 (listing identified bad behavior).

53. See, e.g., Adams, *supra* note 50, at 133.

54. See, e.g., Kozinski, *supra* note 10, at 1717 (“Then there is the matter of one judge (or his staff) showering an applicant with adverse information about another judge: ‘He’s a tyrant to work for’; ‘She’s never in the office’; ‘He’s dumb as dirt.’ And this is only the mildest stuff.”).

55. See, e.g., Avery et al., *supra* note 32, at 805.

56. *Id.* at 795–96.

57. Adams, *supra* note 50, at 131 (quoting Wald, *supra* note 10, at 152) (internal quotation marks omitted).

58. See, e.g., Avery et al., *supra* note 1, at 449.

59. See Avery et al., *supra* note 32, at 801–02. To be sure, it likely is true that more

prefer certain judges but end up with other judges even though the preferred judges would also prefer those applicants.⁶⁰ As for being injudicious, such judges bemoan exploding and vanishing offers, especially coupled with the peculiarity of seasoned judges jockeying among themselves to impress law students.⁶¹ After all, shouldn't judges be above such pettiness?⁶²

This distaste for the unregulated clerkship market has led to numerous unsuccessful efforts to impose a sturdy hiring plan:

Beginning in the 1970s, . . . attempt[s] [were undertaken] to regulate the clerkship market. . . . [All] failed. Judges either ignored the [effort] or backslid from it. Regulation did not work in 1978 when the American Association of Law Schools created guidelines; in 1983 when the Federal Judicial Conference requested that judges move their hiring dates back; in 1989 when then-Judge Stephen Breyer and Judge Edward Becker tried to gather support for greater uniformity in hiring; in 1990 when a prominent group of judges attempted coordination; and in 1994 when Breyer, Becker, and now-Judge Guido Calabresi tried again.⁶³

The common denominator of these regulatory efforts was the belief that the federal judiciary could do better.⁶⁴

D. The Hiring Plan

Notwithstanding this dismal track record, the federal judiciary tried market regulation again in 2003 with the Plan.⁶⁵ This time things were supposed to be different. The Plan, after all, was “[b]acked by an

information (and hence waiting for more grades) will help some judges identify better clerks in some cases. But there are trade-offs. See Nielson, *supra* note 1, at 26 (“Indeed, even proponents of the Plan do not take their efficiency argument to its logical conclusion—that hiring should occur after graduation.”). The question is whether the inefficiency is so weighty that it justifies the costs of a working enforcement mechanism. George Priest argues that the lost efficiency that results from an unregulated market is insufficient to justify collective action. See Priest, *supra* note 7, at 127–28.

60. See, e.g., Avery et al., *supra* note 32, at 804 (noting that mismatches may occur as judges who would prefer certain clerks and clerks who would prefer that judge do not end up together).

61. See, e.g., Avery et al., *supra* note 1, at 449.

62. See, e.g., Wald, *supra* note 10, at 163.

63. Nielson, *supra* note 1, at 23 (citing Priest, *supra* note 7, at 129–33).

64. See *id.*

65. *Id.*

impressive academic study on the characteristics of the clerkship market” and had buy-in from law schools and the majority of circuits and individual judges, including the D.C. Circuit.⁶⁶ This Plan, in other words, was built to last.

In many ways, the Plan worked like the earlier attempts at regulation. For instance, it too set fixed hiring dates: “[J]udges could only hire clerks after they had entered their third year of law school.”⁶⁷ Indeed, as the Plan developed, it set detailed dates for when judges could review applications, when they could first call applicants, and when they could first interview.⁶⁸ Because of the buy-in from law schools, those dates were intended to hold: law schools were not supposed to send letters of recommendation, and without letters of recommendation, it is hard for judges to hire.⁶⁹ The D.C. Circuit—a particularly attractive court for would-be clerks—was also firmly behind the Plan.⁷⁰

Importantly, in 2005, “the federal judiciary also implemented an online system to facilitate the application process.”⁷¹ This online system is OSCAR: the Online System for Clerkship Application and Review. OSCAR was designed as a “user-friendly, online resource that streamlines federal law clerk and appellate staff attorney hiring” by allowing applicants and judges “to easily manage every aspect of the hiring process.”⁷² Instead of having to sort and plow through hundreds (if not thousands) of paper applications, judges using OSCAR can easily review applications and sort applicants through an online interface. OSCAR propped up the Plan because computers do not cheat.⁷³ It did not allow judges to review applications before set times. In this way,

66. See *id.* (citing Avery et al., *supra* note 32); see also *id.* (explaining that “the study’s ultimate recommendation that there be a ‘modified medical match’ system . . . was not followed”).

67. *Id.*

68. Avery et al., *supra* note 1, at 450.

69. See Avery et al., *supra* note 32, at 867 (“Making it more difficult for judges to gather information will impede their ability to move early, and so (for example) the strategy of asking law schools to embargo letters of recommendation . . .”).

70. Nielson, *supra* note 1, at 24.

71. *Id.* at 23.

72. What is OSCAR?, OSCAR, <https://oscar.uscourts.gov/about> (last visited Nov. 2, 2014), archived at <http://perma.cc/S8W9-YHM8>.

73. See generally Mark W. Pletcher & Ludovic C. Ghesquiere, *In Restraint of Trade: The Judicial Law Clerk Hiring Plan*, 78 U. COLO. L. REV. 147, 190 (2007) (“While judges, law schools, and students have distinct incentives to cheat, machines do not cheat.”).

OSCAR “reinforced the Plan’s calendar—judges who wanted to use the convenient online system could not easily defect from the Plan’s hiring dates.”⁷⁴

E. The Hiring Plan’s Collapse

The Plan, however, like its predecessors, was a failure. To be sure, the Plan lasted longer than all previous attempts. Nevertheless, it ultimately had the same fate. The following actions contributed to the Plan’s demise.

Some Judges Openly Refused to Follow the Plan

At the outset, some judges simply declined to follow the Plan. Judge Jerry Smith of the Fifth Circuit, for instance, was open about this. Soon after the Plan was initiated, he explained that no one voted on the Plan, he thought the Plan was a bad idea for both judges and applicants, and he would not follow it.⁷⁵ As the Plan’s collapse neared, he again described his philosophy:

I do not follow the unofficial and totally voluntary “hiring plan.” No judge, law school, student, or professor is bound by that plan. If law professors refuse to provide early recommendation letters, I will consider the application without them. A list of grades can be submitted if an official transcript is not available.⁷⁶

Other judges eventually took this position too. Indeed, the Fourth Circuit, after an internal debate, officially voted to stop following the Plan.⁷⁷ Eventually other courts followed suit. Some courts “openly acknowledge[d] that most of their judges [did not] follow the plan—most notably the 4th, 5th, 10th and 11th circuits.”⁷⁸

That those circuits were most reluctant to follow the Plan should not be surprising. From the beginning, some complained that the Plan disproportionately benefited those judges nearest to the highest-ranked

74. Nielson, *supra* note 1, at 23–24.

75. See, e.g., Bashman, *supra* note 16.

76. The source for this citation is no longer available online. Judge Smith, however, has confirmed to the author of this Article that this quotation is accurate. In the interests of full disclosure, the author of this Article clerked for Judge Smith from 2007 to 2008.

77. Sloan, *supra* note 35 (“‘The judges on the 4th Circuit voted several years ago to bypass the hiring plan altogether,’ said Chief Judge William Traxler Jr.”).

78. *Id.*

law schools.⁷⁹ Courts that are not as accessible to students have an incentive to hire outside of the compressed time frame mandated by a hiring plan.⁸⁰

Some Judges Secretly Refused to Follow the Plan

Those judges who openly defied the Plan were shadowed by a larger group of other judges who secretly hired early.⁸¹ Among those in the know, the rumors were everywhere. Indeed, websites like *Law Clerk Addict* (in which applicants anonymously reported when judges were interviewing) were created to monitor such secret hiring.⁸² Those applicants who were guileless enough to trust the Plan were at a real disadvantage.

These shadowy defections were augmented by law schools that also secretly began sending recommendation letters early. In 2012, *Above the Law*, the legal community's go-to site for rumormongering, released a memo from Georgetown explaining that it was aware that other law schools were sending such letters before the Plan allowed.⁸³ Sending letters of recommendation early, of course, only mattered because judges were reading those letters. Many individual law professors were willing to send letters early even if their schools were not. This too created unfairness; students whose recommenders toed the line were out of luck.

79. See, e.g., Bashman, *supra* note 16 (“Any plan with tightly defined deadlines benefits mostly the judges in the I-95 corridor between Boston and Richmond, where students can schedule a large number of interviews in a compacted period of time.”); Kozinski, *supra* note 10, at 1719 (same point).

80. Kozinski, *supra* note 10, at 1719.

81. See, e.g., Dave Hoffman, *The Quickly Unraveling Clerkship Market*, CONCURRING OPINIONS (Sept. 9, 2010), <http://www.concurringopinions.com/archives/2010/09/the-quickly-unraveling-clerkship-market.html>, archived at <http://perma.cc/9WEW-CSYW> (“Many, many federal judges have quietly opted out, by soliciting resumes directly, making calls when they please . . .”).

82. See *Federal Judges Who Do NOT Follow the Plan for 3Ls*, L. CLERK ADDICT, <https://web.archive.org/web/20100225095049/http://www.lawclerkaddict.com/hiring/offplan> (last visited Nov. 2, 2014), archived at <http://perma.cc/YM4P-ATBG>.

83. See David Lat, *The Law Clerk Hiring Plan, R.I.P.*, ABOVE THE LAW (June 11, 2012, 3:46 PM), <http://abovethelaw.com/2012/06/the-law-clerk-hiring-plan-r-i-p/>, archived at <http://perma.cc/GH8V-8BY4> (“We recently learned that some of our peer schools are submitting students’ applications for judicial clerkships in advance of deadlines established by the federal law clerk hiring plan. Because we want to ensure that our students have full access to federal judicial clerkship opportunities for the 2013–2014 term, we are adding a June 11 mailing . . .”).

Some Judges Tried to Skirt the Edges

At the same time, other judges tried to follow the letter of the Plan while undermining its spirit. The most jarring example of this was the informal coffees or other meetings that took place in which judges met with potential clerks but did not conduct formal interviews.⁸⁴ This way judges could form alliances with would-be clerks, even though the official offer was not extended until when the Plan allowed.⁸⁵ Some judges also took the view that certain hiring did not actually violate the Plan, for instance if the judge had a pre-existing relationship with the would-be clerk. The Plan's categorical language did not contain any such exception, but some judges, driven perhaps by motivated reasoning, felt it was implicit.

Another, more subtle, form of Plan-skirting involved hiring graduates instead of law students.⁸⁶ The Plan did not regulate applicants who had already passed the third year of law school, so judges could interview and hire those applicants whenever they wanted.⁸⁷ Many did "because hiring a full cohort of clerks on a single day is difficult."⁸⁸ In other words, the Plan not only impacted *when* hiring occurred, it also changed *who* was hired.⁸⁹ Granted, alumni hiring did not technically violate the Plan. But it did undermine the idea that hiring would be regularized. It also was frustrating for law students who realized that clerkships were being snatched up before they could even apply. That reality undoubtedly prompted more applications from 2Ls who wanted to be in the mix.

84. See, e.g., David Lat, *Clerkship Hiring Is Getting Earlier and Earlier*, ABOVE THE LAW (Apr. 11, 2013, 2:25 PM), <http://abovethelaw.com/2013/04/clerkship-hiring-is-getting-earlier-and-earlier/>, archived at <http://perma.cc/R8S4-NEA3> (noting "the current practice of judges informally getting to know particularly promising applicants in advance of the official Plan period, through lunches or coffees or the like, and then making official offers on the magic day").

85. *Id.*

86. See, e.g., *id.* ("[S]ome judges, wanting to avoid the insanity, will just start hiring more clerks 'off cycle'—e.g., law school graduates already working as lawyers, who are not covered by any of the Plan rules (which, of course, are advisory to begin with).").

87. *Id.*

88. Nielson, *supra* note 1, at 25.

89. See *infra* notes 137–39.

The “Chump” Principle

All the while, the “chump” principle then began kicking in.⁹⁰ As Dan Kahan has explained, “[e]ven a strong propensity to obey the law . . . can be undercut by a person’s ‘desire not to be suckered.’”⁹¹ In those situations in which it looks like everyone else is bending the rules with no consequence, it can be hard to stand fast. If the chump principle can sometimes apply to criminal acts like violating tax laws, or civil infractions like ignoring driving rules, it surely has even more purchase for entirely voluntary codes of conduct.

The chump principle also applies to judges. Even judges who previously followed the Plan stopped doing so when they saw others ignoring it. For instance, then-Chief Judge Mary Beck Briscoe of the Tenth Circuit justified her court’s decision to not follow the Plan by stating that, “[q]uite frankly, we just saw that other areas of the country were not following the plan.”⁹² That same analysis surely went through the minds of many judges.

The D.C. Circuit’s Decision

The D.C. Circuit then delivered the *coup de grâce* in January 2013.⁹³ The D.C. Circuit largely stuck to the Plan for years. Indeed, former-Chief Judge Harry Edwards of that court was a key player in designing the system.⁹⁴ Because the D.C. Circuit is such a prestigious court, it had

90. See generally Janet Novack, *Are You a Chump*, FORBES (Mar. 5, 2001, 12:00 AM), <http://www.forbes.com/forbes/2001/0305/122.html>, archived at <http://perma.cc/4TU9-EKVD> (explaining that the realization that many others are not following the tax laws may lead to less compliance by others); see also Avery et al., *supra* note 1, at 469 (describing “Thomas Schelling’s ‘dying seminar’”) (citing THOMAS C. SCHELLING, MICROMOTIVES AND MACROBEHAVIOR 91–92 (1978)).

91. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 604 (1996) (quoting Peter H. Huang & Ho-Mou Wu, *More Order Without More Law: A Theory of Social Norms and Organizational Cultures*, 10 J.L. ECON. & ORG. 390, 403 (1994)).

92. Sloan, *supra* note 35.

93. Aaron L. Nielson, *Law Clerk Hiring Plan is Dead, and Good Riddance*, NAT’L L.J., Feb. 11, 2013, http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202586922678&The_law_clerk_hiring_plan_is_dead_and_good_riddance, archived at <http://perma.cc/J2WF-28CB>.

94. See Debra M. Strauss, *From the Judicial Clerkship Files: Putting It in Perspective—Understanding the History of the Timing Issue and Making Lemonade*, ABOVE THE LAW (Nov. 7, 2013, 2:08 PM), <http://abovethelaw.com/career-files/from-the-judicial-clerkship-files-putting-it-in-perspective-understanding-the-history-of-the-timing-issue-and-making-lemonade>, archived at <http://perma.cc/XF7S-UR55>.

an anchoring effect for the entire Plan.⁹⁵ Some applicants waited until the D.C. Circuit made decisions before considering other options.⁹⁶

Eventually, however, the D.C. Circuit gave up. Invoking the chump principle, the D.C. Circuit explained that:

Although the judges of this circuit would uniformly prefer to continue hiring law clerks pursuant to the Federal Law Clerk Hiring Plan, it has become apparent that the plan is no longer working. Because participation in the plan is voluntary, a significant percentage of all United States circuit judges must agree to follow it if it is to work appropriately. During the past few years, a significant and increasing number of circuit judges around the country have hired in advance of the plan's interview and offer dates, and it is likely that they will continue to do so. As a result, continued adherence to the plan is no longer fair and equitable to either students or judges.⁹⁷

The D.C. Circuit explained that although it is willing “to work with the judges of the other circuits to develop an appropriate successor to the current plan,” each of its judges could hire when he or she “determines to be appropriate.”⁹⁸ The court also explained that none of its judges would “give ‘exploding offers’ Rather, when a judge of this circuit gives a candidate an offer, the candidate will have a reasonable time to consider the offer and interview with other judges before accepting or declining.”⁹⁹

The Official Collapse

After the D.C. Circuit's decision, everything fell apart quickly.¹⁰⁰ Students and judges all around the country frantically tried to come to terms with the new landscape. For instance, in a last-ditch effort “to stay relevant in the wake of the D.C. Circuit's decision, the OSCAR

95. See Nielson, *supra* note 1, at 24.

96. *Id.*

97. Notice Regarding Law Clerk Hiring, *supra* note 5.

98. *Id.*

99. *Id.* Given the value of a D.C. Circuit clerkship, a promise to not issue exploding offers in many instances has little effect. After all, as George Priest has explained, judges outside of the D.C. Circuit make early offers—and by parity of reasoning, issue exploding offers—to compete with the D.C. Circuit. See Priest, *supra* note 7, at 155, 163. Although it happens, it is rare for a clerkship applicant to turn down a D.C. Circuit clerkship to take another offer.

100. Nielson, *supra* note 1, at 24.

Working Group judges reset the Plan's critical date to June 28, 2013."¹⁰¹ That effort was short lived. In November 2013, OSCAR, bowing to reality, officially began allowing 2L students to apply through the online system.¹⁰²

III. THE REASON WHY THE PLAN COLLAPSED

The reasons why the Plan failed should be obvious to anyone with an understanding of markets—it's really hard to run a cartel. Indeed, "[i]t ignores decades of antitrust insight . . . to think that massive coordination could be sustained in a market with hundreds of competing judges, little transparency, and no enforcement mechanism."¹⁰³ The temptation to cheat is just too strong. This principle, which is "[s]tandard economic theory,"¹⁰⁴ applies with full force in the clerkship context. "Cartels do not work. People cheat. Judges cheat. Law schools cheat."¹⁰⁵

It may be jarring to characterize the Plan as a cartel. When one thinks of a cartel, images of smoke-filled rooms populated by gangsters and nineteenth century tycoons spring to mind.¹⁰⁶ But even if a clerkship plan is more noble,¹⁰⁷ the mechanism is the same: collective action to change a market equilibrium. For a price-fixing agreement to work, all the members of the cartel must agree on a price and then honor that agreement. Regulating the clerkship market is similar; to change the timing equilibrium that results from an unregulated market, judges must agree to change their hiring practices. Accordingly, although the ends sought by the Plan may be more commendable,¹⁰⁸ what it takes for collective action to succeed is no different.

101. *Id.* at 25 n.7.

102. See *OSCAR De-links from the Hiring Plan*, *supra* note 6.

103. Nielson, *supra* note 1, at 24.

104. Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 BYU L. REV. 827, 842–43 (describing the demise of past efforts at clerkship-hiring regulation).

105. Todd Zywicki, *Herding Cats*, 5 GREEN BAG 2D 239, 239 (2002) (quoting Avery et al., *supra* note 32, at 860 tbl.21) (internal quotation mark omitted).

106. Cf. Tefft W. Smith, *An Iconoclastic Attack on the Antitrust Community: A Review of Edwin S. Rockefeller's The Antitrust Religion*, 5 N.Y.U. J.L. & LIBERTY 436, 441 (2010) (book review) (discussing the Standard Oil Trust which arguably helped instigate the "Antitrust Religion").

107. But see Kozinski, *supra* note 10, at 1719.

108. See, e.g., Smith, *supra* note 106, at 454 (explaining that hard-core "price fixing is like selling drugs to school children").

Likewise, as happens with many regulatory efforts,¹⁰⁹ the Plan had unintended consequences. The Plan actually encouraged injudicious conduct and changed not just *when* but *whom* judges hired. Those unintended consequences further doomed the Plan.

A. *What a Successful Cartel Needs*

One of the most important insights of antitrust economics is that it is hard to make a cartel work. Although there are examples of long-lasting cartels, it nonetheless is the case that “[e]conomic theory confidently predicts that cartels should be short-lived, as firms succumb to the temptation to cheat or free ride on their agreement.”¹¹⁰

As Ian Ayers has explained, economists typically consider the following factors in determining whether a cartel can succeed:

To collude effectively, firms must be able (1) to reach an agreement, (2) to detect breaches of the agreement, and (3) to punish firms that breach. Advocates of the structural approach have suggested a variety of market characteristics that affect these conditions. Some characteristics (such as seller concentration, or the homogeneity of the product) relate to the ease of reaching an agreement; others (such as stable demand, or announcement of the lowest sealed bid) affect the ability to detect price-cutting breaches.¹¹¹

While all of those factors matter, the most important element of a successful cartel may be its enforcement mechanism, i.e., the way that wayward participants are punished for deviating from the agreement.¹¹² The lack of a viable enforcement mechanism is one of the most common reasons why cartels fail.¹¹³ In fact, whether there is an enforcement mechanism in place is probative evidence as to whether a cartel exists at

109. See, e.g., Nielson, *supra* note 1, at 27 (explaining that “regulation that is amply justified in principle may go terribly wrong in practice” (quoting Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1390 (1994)) (internal quotation mark omitted)).

110. Andrew R. Dick, *When Are Cartels Stable Contracts?*, 39 J.L. & ECON. 241, 242 (1996).

111. Ian Ayres, *How Cartels Punish: A Structural Theory of Self-Enforcing Collusion*, 87 COLUM. L. REV. 295, 296 (1987) (footnote omitted).

112. See, e.g., *id.* (noting that one “condition for successful collusion” is “being able to punish breach”).

113. See, e.g., Dick, *supra* note 110, at 249.

all.¹¹⁴ As the Third Circuit has noted, “a cartel cannot survive absent some enforcement mechanism because otherwise the incentives to cheat are too great.”¹¹⁵ In other words, without a viable enforcement mechanism, the temptation among the cartel members to undersell their co-conspirators is just too strong, even if a market is susceptible to collusion.

It follows *a fortiori* that an enforcement mechanism is critical where the market is not otherwise susceptible to collusion. Put differently, there is a sliding scale. If a market has few participants, is transparent, and is for homogeneous products, there still must be an enforcement mechanism, but it need not be as powerful. But the more a market diverges from that simple model, the more an enforcement mechanism must do. Speaking broadly, this is the question facing a cartel: does cheating produce a higher expected value than not cheating? Answering that question involves discounting the benefits of cheating by the odds of being caught and punished. If cheating will be certainly detected, then the punishment need not be weighty. But if detection is unlikely, then the punishment must be more severe.

This basic building block of antitrust analysis explains why cartels and organized crime go hand in glove. In markets where the probability of detection is low and the penalty is only a slap on the wrist, the benefits of cheating seem high. But if the penalty is a broken leg, or worse, then even if the odds of detection are slight, a rational actor would pause before defecting. In other words, a realistic threat of a mob hit may keep the members of a cartel in line.¹¹⁶ In markets not otherwise susceptible to collusion, however, and where the threat of gangland violence isn't on the table, a cartel can only persist if other severe sanctions are available. The longest-lasting cartels, unsurprisingly, may be those backed by the government, with heavy fines or even imprisonment serving as the enforcement mechanism.¹¹⁷

114. See, e.g., Ayres, *supra* note 111, at 298 (noting that the “ability to punish is a precondition of collusion”).

115. Petruzzi's IGA Supermarkets, Inc. v. Darling-Del. Co., 998 F.2d 1224, 1233 (3d Cir. 1993).

116. See, e.g., Christopher R. Leslie, *Antitrust Amnesty, Game Theory, and Cartel Stability*, 31 J. CORP. L. 453, 461 (2006) (“One solution, most associated with organized crime, is to kill the snitch. If the price of confession is death, not confessing becomes a dominant strategy regardless of the numbers in the prisoner's dilemma matrix.”).

117. For instance, the Agricultural Marketing Agreement Act of 1937 has been characterized as a cartel. See, e.g., Darren Filson, Edward Keen, Eric Fruits & Thomas Borchering, *Market Power and Cartel Formation: Theory and an Empirical Test*, 44 J.L. &

B. Enforcement Mechanisms are Expensive

Powerful enforcement mechanisms, however, are often economically costly—i.e., it requires giving up a lot to have an enforcement mechanism that works. In the price-fixing context, for instance, one possible enforcement mechanism is excess production capacity.¹¹⁸ The idea is that if one agreeing party deviates from the agreement, another could flood the market with the product to reduce prices even further, thus leaving the initial cheater worse off than if it just complied with the agreement.¹¹⁹ Excess capacity, however, is obviously expensive. Of course, those cartels that rely on government enforcement are also costly.

C. The Plan's Enforcement Mechanisms Were Too Weak

These foundational antitrust principles explain why the Plan failed. Its enforcement mechanisms were just too weak.¹²⁰ Those judges competing for clerks had incentives to cheat and not follow the Plan, and the Plan's methods of preventing such cheating were woefully ineffective.

1. OSCAR Did Not Replace Old-Fashioned Mail

The Plan's primary enforcement mechanism appears to have been OSCAR.¹²¹ OSCAR is easy to use. For judges who receive hundreds or even thousands of applications, it is wonderful to be able to electronically sort them and not have an office full of piles of paper. But OSCAR was supposed to come at a price. OSCAR could in theory force judges to follow the dates set by the Plan. Again, computers do not cheat. The enforcement mechanism, accordingly, was the loss of OSCAR. Judges who wanted the benefits of OSCAR could, in theory, only obtain them by following the Plan.

OSCAR, however, could not carry the weight placed upon it. A

ECON. 465, 466 (2001).

118. See, e.g., William E. Kovacic, Robert C. Marshall, Leslie M. Marx & Halbert L. White, *Plus Factors and Agreement in Antitrust Law*, 110 MICH. L. REV. 393, 424 (2011) ("Because courts will not enforce cartel agreements, a cartel must devise enforcement mechanisms and threats. A common threat is to hold excess capacity . . .").

119. See Ayres, *supra* note 111, at 304 n.40.

120. Avery et al., *supra* note 32, at 864 ("The problem is the familiar one of trying to sustain a self-enforcing cartel—one in which there is no outside sanction for defection.").

121. See, e.g., Sloan, *supra* note 35 ("The system will not release student applications to judges until the September kickoff date, which helps encourage compliance.").

computer system is convenient, not essential. Applicants and recommenders could always apply the old-fashioned way: the post office. This meant that when OSCAR would not allow 2Ls to apply, those 2Ls would just send materials in hard copy. It is not as if judges do not read their mail. In fact, judges sometimes posted openings on OSCAR, received hard-copy applications in response, and then arranged interviews.¹²² In short, so long as the U.S. Postal Service delivers mail to federal courthouses, judges who want to hire 2L applicants will be able to do so.

2. Law Schools Had Incentives to Cheat

Nor could the Plan depend on law schools. If law schools would not send letters of recommendation, then many (but not all) judges would not hire.¹²³ And, in theory, law schools could speak ill to students of judges who hired early, thus discouraging the practice. Career counselors could also encourage students to hold fast and not apply early. In these ways law schools could make it harder for judges to hire and potentially could even harm the reputation of those judges who were looking to do so.

The problem is that law schools are competing against each other. Just as judges have incentives to move early, law schools have those same incentives. This means that when some law schools began sending materials to judges before the Plan allowed, it was only a matter of time before they all did.¹²⁴ And even if the law school itself was unwilling to do so, some faculty members were.¹²⁵

Nor were law schools likely to say no to federal judges, much less deride them to their students. Some career counselors and law professors undoubtedly discouraged students from sending early applications,¹²⁶ but would they really tell a judge who called on the telephone that they would not provide information about would-be clerks, especially if they knew that doing so could easily cost the student the clerkship? It is hard to imagine such dogmatic devotion to the Plan lasting very long. Given just how scarce clerkships are, it is incredible to

122. See, e.g., *id.* (explaining the dynamic).

123. Avery et al., *supra* note 32, at 867.

124. See Lat, *supra* note 83 (discussing Georgetown's exit from the Plan as a reaction to exits by peer schools).

125. See Pletcher & Ghesquiere, *supra* note 73, at 156.

126. Avery et al., *supra* note 32, at 867 ("[T]he temptation to talk to a judge who has already started gathering information about other candidates may be considerable.").

think that law schools would create black lists of judges whom students should avoid. Law schools are simply not institutionally designed to prevent judges from hiring law students.

3. The D.C. Circuit Was Not a Strong Enough Anchor

One of the most powerful things the Plan had going for it was the cooperation of the D.C. Circuit. The D.C. Circuit, of course, is a unique court. For clerkship applicants, the D.C. Circuit is attractive in at least two respects. First, the court is in Washington, D.C., the same place where a lot of the nation's top legal jobs are located. Because many clerks go on to work there (or have a significant other who is already there), being in D.C. is valuable. Second, because of the court's national reputation,¹²⁷ it has remarkably capable judges. Unlike other circuits with one or two judges who regularly feed to the Supreme Court, the D.C. Circuit is full of such judges.¹²⁸

Because the D.C. Circuit—with its benefits to clerks—was committed to the Plan, many top students (a number far exceeding the D.C. Circuit clerkship slots) were reluctant to accept clerkships elsewhere until that court had made its decisions.¹²⁹ So those students would not apply before the Plan allowed. The D.C. Circuit thus served as an enforcement mechanism of sorts; judges who wanted to hire early potentially sacrificed the ability to compete for some of the top applicants in the pool.

The gravitational pull of the D.C. Circuit, however, was not strong enough. There are many talented judges all around the country, including in other attractive cities. Even those students who believe they are realistically in the running for the D.C. Circuit are often thrilled to accept clerkships elsewhere.¹³⁰ The D.C. Circuit is a great court, but the experience and prospects that its clerks have are not so categorically

127. Cf. Howard Bashman, *20 Questions for Circuit Judge Frank H. Easterbrook of the U.S. Court of Appeals for the Seventh Circuit*, HOW APPEALING (Aug. 2, 2004, 12:00 AM), http://howappealing.law.com/20q/2004_08_01_20q-appellateblog_archive.html, archived at <http://perma.cc/K4HM-NPKD> (“Gerhard Casper, my Dean at the time, was nonplussed; he said that he could understand jumping to the D.C. Circuit but not to a regional circuit.”).

128. See David R. Stras, *Secret Agents: Using Law Clerks Effectively*, 98 MARQ. L. REV. 151, 155 tbl.2, 157 tbl.3 (2014).

129. See, e.g., Carl W. Tobias, *Tips for Capturing 2014 Federal Clerkships*, 66 VAND. L. REV. EN BANC 145, 145–47 (2013), http://www.vanderbiltlawreview.org/content/articles/2013/10/Tobias_Final.pdf, archived at <http://perma.cc/8YHK-R8JL>.

130. See Priest, *supra* note 7, at 137.

different that it can prevent unraveling.¹³¹

4. Informal Stigma

Finally, stigma can be an enforcement mechanism.¹³² No judge wants to be written off as a bad actor. In theory, if judges were stigmatized for not following the Plan, hiring would be different. But there is no such stigma—or if there is, it is very slight. Tellingly, some of the nation's leading jurists did not follow the Plan, including apparently feeder judges from across the ideological spectrum.¹³³ These are judges of real standing. Potential harm to reputation was not enough to keep the Plan afloat.

D. Unintended Consequences

Importantly, not only did the Plan fail to include an enforcement mechanism powerful enough to succeed, it also had serious unintended consequences. These consequences further doomed the Plan.

For instance, perversely, the Plan encouraged exploding (and vanishing) offers.¹³⁴ After all, “[i]n a compressed hiring season, judges must hire quickly—hence more exploding offers.”¹³⁵ Interestingly, this dynamic would almost certainly have been worse had the Plan worked. The Plan, with its set deadlines, attempts to direct all hiring to a compressed time period. But a compressed time period increases the temptation to issue exploding or vanishing offers. If everyone is hired on the same day, then there is no time to delay. From a judge's perspective, an applicant with an offer in hand may wait a few hours and then say no. All the while, other applicants are snatched up. The judge in such a situation would face few choices, none ideal. She could (1) give the applicant time and not make other offers, all the while hoping that the applicant eventually accepts or that other good candidates are not hired in the meantime; (2) issue an exploding offer; or (3) continue to interview candidates and make offers to the good ones (which, if those offers are accepted, may mean that the offer to the initial candidate is a vanishing offer). The noblest option is the first, but one can at least understand, though not excuse, a frustrated judge's

131. See, e.g., *id.* at 155, 163.

132. See, e.g., Leslie, *supra* note 116, at 461–62.

133. Federal Judges Who Do NOT Follow the Plan for 3Ls, *supra* note 82.

134. Nielson, *supra* note 1, at 25.

135. *Id.*

weakness. When the clock is ticking, the opportunity cost of holding an offer open is high.

The Plan's collapse, accordingly, diluted the incentive to issue exploding offers. Judge Smith presciently cited this precise point as a reason to not participate in the Plan at all.¹³⁶ The fact that the Plan, designed to prevent one of the perceived problems with an unregulated market (2L hiring) actually made the other perceived problem (injudicious conduct) worse was a profoundly pernicious unintended consequence.

But there was another key unintended consequence. Not only did the Plan incentivize exploding offers, it also encouraged judges to not hire law students at all.¹³⁷ Because of the Plan, some judges decided to hire alumni applicants rather than student applicants—and so comply with the Plan—to avoid the chaos of hiring all the clerks on a single day.¹³⁸ As Richard Revesz observed, “some judges don’t like the hiring frenzy that takes place on the first day they can interview 3Ls under the rules[.] . . . A way to avoid that and still comply with the rules is to hire alumni.”¹³⁹ While practicing attorneys are not bad hires, not all judges prefer them. In other words, imagine two applicants, *A* and *B*. Although the two are similar, all else being equal, a particular judge would prefer *A* to *B*. But the applicants are not equal: *A* is a student and *B* is a graduate. If the judge were to hire *B* instead of *A* solely because *B* could be hired without the Plan's restrictions, that is a problem.

IV. CLERKSHIP HIRING TODAY

So what does the clerkship market look like today? It is hard to say for certain because the market is still largely opaque; while judges post openings on OSCAR, it is difficult to know when judges are *really* looking at applicants rather than just collecting resumes. Nevertheless, there are anecdotes. The information in the next section reflects insights gathered from numerous conversations with judges, students, and faculty. This anecdotal information, moreover, is consistent with the limited data that has been collected to date.¹⁴⁰ As an added bonus, it

136. See, e.g., Bashman, *supra* note 16.

137. See, e.g., Lat, *supra* note 84.

138. See, e.g., Sloan, *supra* note 35.

139. See, e.g., *id.* (internal quotation marks omitted).

140. See, e.g., Tobias, *supra* note 129, at 146–47; Carl Tobias, *Salvaging the 2013 Federal*

also happens to jibe with commonsense.

A. 2L Hiring

First, as one would expect, the date that hiring occurs is moving up for many judges, particularly those serving on appellate courts. While not all hiring now occurs in the 2L year, much of it does.¹⁴¹ The author personally heard one prominent appellate judge urge students to apply no later than January of the second year and earlier if possible; this advice is consistent with what other judges are saying. Any applicant for a federal court of appeals clerkship with a passable writing sample ought to plan on applying as soon as the first semester 2L grades are available, and perhaps even earlier.

District courts, however, appear to be different, at least somewhat. It seems that many district courts are not moving as quickly.¹⁴² Upon reflection, this is unremarkable. A district court clerkship is a different beast. Whereas an appellate court clerkship is quite similar to what a student does in law school—reading cases, discerning doctrine, writing it up, with a dose of cite-checking thrown in for good measure—a district court clerkship requires additional skills. District court clerks handle different tasks, many of which are unfamiliar to most law students, including juggling a large docket and sometimes engaging in contact with the practicing bar. The skills used by appellate clerks are obviously not irrelevant; district court clerks also need to be able to read cases and write well. But those skills are not sufficient. It thus makes sense that district court judges may be more wary of basing hiring decisions on 1L grades, at least at the margins. A phone call from a practicing lawyer, perhaps the applicant's 2L summer employer, may be especially meaningful. For these reasons, it also makes a lot of sense for district court judges to hire law graduates instead of law students.

Some district court judges also may hesitate to compete directly with appellate courts. Interestingly, it appears that a fair number of students arrange a clerkship with an appellate judge first, and then secure another clerkship (sometimes to occur before the appellate clerkship) with a district court. The inverse is still more common, but things may be changing.

Law Clerk Hiring Season, 91 WASH. U. L. REV. 243, 245 (2013).

141. See, e.g., Tobias, *supra* note 129, at 145–46 (explaining that numerous courts of appeals are hiring 2Ls, especially prestigious or otherwise desirable appellate courts).

142. See Tobias, *supra* note 140, at 245.

B. The 1L Year Matters More

Second, and related to the first point, with hiring moving up, judges must make decisions with less information. This means that the 1L year, already the most important,¹⁴³ is now even more important. Everything about the year matters more: first-year grades; the jobs students find during the 1L year for the summer; and faculty contacts.

That last point deserves reflection. Professors that teach 1L classes can expect to be asked to write even more recommendation letters; students often will not know anyone else on the faculty, certainly not well enough to ask for a letter. Given that reality, law schools should consider expanding the pool of professors who teach in the 1L year or find other ways to create meaningful contacts between more of the faculty and the first-year students.

C. Top Law Schools Are — Or At Least Should Be — Doing Better

It also appears to be the case that the top law schools are doing better in the post-Plan world. If this is happening, it makes sense. If there are two clerkships candidates, one from the University of Chicago and one from a lower-ranked school, and neither has had time to prepare a good writing sample, a judge often will (reasonably) conclude that the Chicago applicant could write well with time, but will wonder a bit more about the other applicant. After all, although some students at lower-ranked schools can write well, not as many can, so that hire is riskier. Uncertainty thus favors the better brand and those students with better undergraduate credentials.¹⁴⁴ Similarly, there is less time to build faculty support for candidates. This also helps the Chicago applicant because Chicago students, even without substantial faculty support, are relatively safe hires. On the other hand, at lower-ranked schools, sometimes a judge might wonder if even the best student in a particular class is good enough, especially for a prestigious clerkship. So class rank alone might not provide sufficient information about applications from lower-ranked schools; a judge needs to be assured by the faculty that the student has what it takes.¹⁴⁵ If the faculty at a lower-

143. See, e.g., John O. Sonsteng with Donna Ward, Colleen Bruce & Michael Petersen, *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century*, 34 WM. MITCHELL L. REV. 303, 344 (2007) (“[F]irst-year grades are considered by many as the most important of a law student’s academic career.”).

144. See Priest, *supra* note 7, at 180.

145. Cf. Dan Filler, *Supreme Court Clerk Feeder Judges And Snaring Those Clerkships When You Didn’t Go To Yale*, CONCURRING OPINIONS (May 11, 2006),

ranked school does not have enough time to get to know a student, however, then that student, despite abundant talent, may be out of luck.

On the other hand, the fact that some top schools have moved away from letter grades (or even grades at all, at least for part of the 1L year)¹⁴⁶ could hurt their students.¹⁴⁷ I suspect, but cannot prove, that schools like the University of Chicago that retain rigorous grades will do disproportionately well in the new clerkship environment. After one year of law school, there is more information regarding the legal aptitude of a Chicago applicant than of a Harvard or Yale applicant. To be sure, while a randomly selected student from Chicago may, on average, be a touch less accomplished than a randomly selected student from Yale, at least according to traditional measures, a top student at Chicago is better than an average student at Yale. This means that the harder it is for judges to know whether a particular student is good or average, the more likely they are to lean towards schools like Chicago. Granted, this does not mean that Chicago will surpass Harvard or Yale in the race, but it may suggest that schools without rigorous grades are not obtaining as many clerkships for their students as they could.¹⁴⁸

D. Many Practicing Attorneys Are Still Being Hired

Finally, many judges are still hiring graduates instead of law students—though presumably current students are doing relatively better in the post-Plan world.¹⁴⁹ Some judges prefer hiring graduates

http://www.concurringopinions.com/archives/2006/05/supreme_court_c.html, *archived at* <http://perma.cc/AMQ-79BC> (“The faculty also have to make decisions about prioritizing candidates. . . . [S]ignaling to the Justices that there is a best-and-brightest, that one candidate will get a nice benefit.”).

146. See, e.g., Joshua M. Silverstein, *A Case for Grade Inflation in Legal Education*, 47 U.S.F. L. REV. 487, 499 n.49 (2013) (“Several first-tier institutions—such as Yale, Harvard, and Stanford—have eliminated letter grades altogether by moving to modified Pass/Fail systems.”).

147. Cf. Priest, *supra* note 7, at 179 (“Yale students should be expected to be at an increasing disadvantage because of the absence of first semester grades.”).

148. To be sure, this hypothesis could prove wrong. Priest believes that Yale clerkship applicants, for instance, may do better when fewer of their law grades are available. See *id.* at 180. One can imagine scenarios in which making it harder to distinguish between students at top schools benefits more of those schools’ clerkship applicants. Similarly, without grade dilution, it is possible some students would not attend a particular law school at all, meaning that when a law school changes its grade policies, it may also change the quality of its pool of clerkship applicants. Such questions are beyond the scope of this Article.

149. See Avery et al., *supra* note 32, at 890 tbl.A5.

and do so regularly.¹⁵⁰ While it is problematic if judges hire alumni instead of current students *because* of the Plan, some judges honestly prefer hiring more seasoned clerks even with all else being equal. In other words, this trend, which intensified during the Plan's heyday, has not gone away. It is also likely that some judges initially began hiring graduates because of the Plan and then came to realize that those candidates make better clerks, so now they hire such applicants without the Plan.

V. THE FUTURE OF FEDERAL LAW CLERK HIRING

Against this backdrop, what does the future hold? At least as of now, there does not appear to be a lot of enthusiasm for a new hiring plan. This Article submits that no new plan is likely because the costs to judges of an effective enforcement mechanism are too high relative to the benefits, at least for those benefits that have been identified to date. This means that unless new benefits change the cost-benefit calculus, the unregulated market will be here to stay. This is not to say that the current state of affairs is “hunky-dory,”¹⁵¹ only that the identified gains to date do not justify the costs of an enforcement mechanism powerful enough to ensure coordinated action. That is why more powerful – and more costly – enforcement mechanisms have not been adopted.

Identifying new benefits that are weighty enough to tip the scales, moreover, seems unlikely. Although this Article sketches three potential new benefits, it does not appear that any of them would justify a new hiring plan because less costly alternatives may already be beginning to mitigate the concerns associated with an unregulated clerkship market.

A. *Potential Enforcement Mechanisms Appear Too Costly*

One reason that there has not been a major push for a new hiring plan is that an appropriate enforcement mechanism has not been identified. Many of the ideas for a more powerful enforcement mechanism (such as adopting a medical matching model) have already been proposed, considered, and not adopted. The reason seems to be that such enforcement mechanisms are too costly. This section discusses several possible enforcement mechanisms and explains why those mechanisms are unlikely to carry the day.

150. See, e.g., Lat, *supra* note 84.

151. Kozinski, *supra* note 10, at 1707.

1. The Medical Matching Model

The most common proposal for a real enforcement mechanism is to adopt the medical matching model. In its strongest form, it would work something like this:

On the medical side, all institutions agree to a match process to assign graduates to particular programs. Each potential applicant lists the internships and residencies that he or she would like to join in the order of preference. Each institution lists the applicants it would like to employ in order of preference. A computer program then combines the two lists in an effort to satisfy two simple conditions: (1) no applicant is assigned to a[n] internship or residency if there is some other that the applicant prefers that also prefers that applicant, and (2) no institution receives an applicant if there is available some other applicant that it prefers.¹⁵²

The reason why this might work is that, in theory, no hiring could occur unless the computer approves it. That is a powerful enforcement mechanism. But there are also weaker forms of this proposal. The Chicago-Harvard Study, for instance, urged a “modified medical match.”¹⁵³ This would be a voluntary program, but no clerk hired by a judge who did not participate could later be hired by the Supreme Court.¹⁵⁴

This idea has been proposed for decades but not adopted.¹⁵⁵ This is not an accident. A medical matching program in the context of law schools would cost too much.¹⁵⁶ As Judge Kozinski has explained, judges do not just want good clerks; they want a *team* of good clerks.¹⁵⁷ Many judges also want diversity; they do not want all of the clerks to have gone to the same school or have the same type of background.¹⁵⁸

152. Richard A. Epstein, *Ending the Mad Scramble: An Experimental Matching Plan for Federal Clerkships*, 10 GREEN BAG 2D 37, 43 (2006); see also Kozinski, *supra* note 10, at 1721 n.29.

153. See Avery et al., *supra* note 32, at 871.

154. *Id.* at 875–76.

155. See, e.g., Wald, *supra* note 10, at 163.

156. See Annette E. Clark, *On Comparing Apples and Oranges: The Judicial Clerk Selection Process and the Medical Matching Model*, 83 GEO. L.J. 1749 (1995) (arguing that the federal judiciary is a very different context than the medical community).

157. See, e.g., Kozinski, *supra* note 10, at 1722 (“How does the judge tell the computer how much to downgrade that particular combination? How can the judge even know?”).

158. See, e.g., Wald, *supra* note 10, at 161.

This means the selection of the first clerk impacts the second clerk and so on. In other words, adopting a “medical match” is not costless; it would change the way many judges like to operate their chambers. The fact that judges have not moved towards this sort of approach, despite its prominence and the failure of all the other attempts to regulate the clerkship market, strongly suggests that judges are not willing to trade their ability to assemble a cohesive team of clerks for greater marketplace order. While an algorithm, in theory, could be created to manage some of this (e.g., gender mix, school mix, etc.),¹⁵⁹ it is far from certain that an algorithm could create the mix a judge is looking for,¹⁶⁰ especially because a judge may not know *ex ante*. Some may not consider this to be a serious problem, but others disagree.¹⁶¹

But the problems run deeper. A medical match would also be expensive for the judiciary and applicants alike. For instance, the actual medical matching program employs a large team of well-credentialed professionals to manage it.¹⁶² Those costs are spread out over many thousands of would-be residents.¹⁶³ Undoubtedly, some of that organizational structure could be scaled down for the federal judiciary, but likely not proportionately. This matters because the number of clerkship applicants, although large, is much smaller than the number of residency applicants.¹⁶⁴ At the same time, a medical match would be expensive for students. For students on the East Coast, it may not be onerous to hop on the train to New York or Washington, D.C. Not so, however, for students in the Mountain West. Traveling within the Tenth Circuit is difficult; it is more than a thousand miles from Provo, Utah, to Oklahoma City. But travel is necessary. Otherwise, how would students know the order to rank judges, or vice versa? Medical students schedule lots of trips in hopes of obtaining a multiple-year position; is this really the best use of resources in the clerkship context,

159. See Avery et al., *supra* note 32, at 880.

160. Cf. Wald, *supra* note 10, at 162 (noting the “subtle factors” a judge considers).

161. Avery et al., *supra* note 32, at 884.

162. See *NRMP Staff Profiles*, THE MATCH, <http://www.nrmp.org/about/staff/>, archived at <http://perma.cc/4BDT-8HKM> (last visited Nov. 2, 2014).

163. NAT’L RESIDENT MATCHING PROGRAM, RESULTS AND DATA 2014: MAIN RESIDENCY MATCH, at v (2014), available at <http://www.nrmp.org/wp-content/uploads/2014/04/Main-Match-Results-and-Data-2014.pdf>, archived at <http://perma.cc/DK5F-9YV7> (“Applicants registered for the 2014 Match reached an all time high of 40,394 . . .”).

164. See Ed Finkel, *Crunching Clerks: Funding Cuts and a Tougher Job Market Tighten the Competition*, A.B.A. J., Feb. 2010, at 19, 19 (noting that 10,722 people applied through OSCAR for clerkships during the 2010–2011 court year).

for a one-year gig?¹⁶⁵ One reason, after all, why students may accept clerkship offers instead of continuing to play the field is travel is not cheap or easy and the first judge is often a good enough match. That says something about the economics of the situation, especially for those potential clerks of limited means.

It also is not at all clear that the medical matching model is always good thing to begin with, even for doctors.¹⁶⁶ The actual medical matching program, for instance, was challenged as a violation of the antitrust laws!¹⁶⁷ A group of students brought a putative class action challenging the medical matching program as a cartel designed to artificially deflate wages and increase hours by stifling competition.¹⁶⁸ While the case was pending, Congress enacted a statute preventing antitrust challenges to the program.¹⁶⁹ The notion that medical matching deflates salaries and makes working conditions worse is at least plausible. In other words, although the idea behind matching may have been a noble one, it too may have anticompetitive effects. Is this really the path that the federal judiciary wants to take?

Finally, and perhaps most fatal, a medical match model may not actually work. As the Chicago-Harvard Study explains, judges and applicants may “cheat” and enter into “side deals” where both sides agree to rank the other highly.¹⁷⁰ Indeed, “it is estimated that 10% to 15% of medical students (and of course the corresponding hospitals) cheat on the medical residency match in this way,” and “given the much smaller market for judicial clerks, cheating is likely to be more prevalent” if the program were used for clerkship hiring.¹⁷¹ To be sure, there may be ways to reduce cheating, for instance by programming “a small degree of randomization in the match to destabilize the informal

165. See, e.g., Amy Ho, *How A Nobel Economist Ruined The Residency Matching System For Newly Minted M.D.'s*, FORBES (Apr. 15, 2014, 11:27 AM), <http://www.forbes.com/sites/theapothecary/2014/04/15/how-a-nobel-economist-ruined-the-residency-matching-system-for-newly-minted-m-d-s/>, archived at <http://perma.cc/T67W-BDDH> (“Financially, the Match is devastating. Assume a student applies for 35 programs in one specialty, receives 20 interview offers and accepts 12; these are conservative estimates . . .”).

166. See, e.g., *id.* (discussing the flaws of the medical match).

167. See *Jung v. Ass'n. of Am. Med. Colls.*, 300 F. Supp. 2d 119, 125 (D.D.C. 2004).

168. *Id.*

169. Public Funding Equity Act of 2004, Pub. L. No. 108-218, § 207, 118 Stat. 596, 611–14; see also Ho, *supra* note 165.

170. Avery et al., *supra* note 32, at 883–84.

171. Priest, *supra* note 7, at 140 (citing Avery et al, *supra* note 32, at 870–71).

understandings.”¹⁷² But what if this is not enough? Would even more “randomization”—i.e., mismatches, as judges who want applicants and applicants who want judges are barred from working together—be necessary? In any event, even if limiting autonomy this way was accepted as a necessary evil, the fact remains that all of this adds to the costs and complexity of the endeavor. And the more complexity created, the more likely it would be that unintended consequences would crop up. It is no wonder that judges are not racing to embrace a complex model.¹⁷³

2. The Supreme Court as Enforcer

Another possible enforcement mechanism involves the U.S. Supreme Court: why not make a rule that no Justice will hire clerks from judges who do not follow a hiring plan? This idea was prominently urged by the authors of the Harvard-Chicago study in support of the modified medical matching program,¹⁷⁴ but perhaps it could be used for other types of plans as well.

The logic is straightforward: some judges want to be feeder judges, and many students want to be considered for the Supreme Court. If the path to the Supreme Court is not through judges who hire early, the market will change. Because many applicants want to clerk for feeder judges, students with a realistic shot—and there are many more such students than there are slots—may say no if another judge makes an early offer. Judges hoping to hire those sorts of clerks (i.e., those who are good enough to be competitive for a feeder judge but that may fall through the cracks) thus may also find themselves waiting. Hence no unraveling.¹⁷⁵

172. Avery et al., *supra* note 32, at 883.

173. See, e.g., Edward R. Becker, Stephen G. Breyer & Guido Calabresi, *The Federal Judicial Law Clerk Hiring Problem and the Modest March 1 Solution*, 104 YALE L.J. 207, 222 (1994) (quoting Judge Richard Cudahy of the Seventh Circuit as saying that “anything more sophisticated [than a date would] likely . . . break down” (internal quotation marks omitted)).

174. See, e.g., Avery et al., *supra* note 32, at 846–47, 871–84.

175. It has been suggested that there are two kinds of judges—those who want to be feeders and those who do not. See *id.* at 872–73. The blame for the unraveling has been placed at the feet of the feeders. *Id.* I am not so sure. Many judges who backslid from the Plan were not feeders, nor were they competing for clerks who could be fed. See, e.g., Sloan, *supra* note 35 (noting that refusals to follow the plan were most open in “the 4th, 5th, 10th and 11th circuits”). I have also seen sharp hiring practices from judges who have not sent, nor likely ever will send, clerks to the Supreme Court. And do not forget state court judges, who are not wallflowers in the clerkship scramble.

There are problems with this idea, however—even if it would work, which is far from certain (after all, many students will say yes rather than hold out hope for a feeder judge, and some non-feeder judges may try to hire such applicants, thereby spawning another race). Most significantly, the Supreme Court does not appear interested in this role. The reason for this reluctance seems obvious; the Supreme Court wants to hire whom it wants to hire. Perhaps the Justices are being unreasonable; perhaps the pool of quality Supreme Court clerks is so deep that limiting applicants will not matter.¹⁷⁶ But the fact remains that the Justices have not embraced the idea of being enforcement mechanisms, even though nothing is stopping a Justice from unilaterally doing so. The Supreme Court appears to believe that the problem is not serious enough to merit its involvement.

Nor does the Supreme Court want to be in the business of policing informal agreements. With a medical matching model, some sort of randomization can be thrown in the mix, thus preventing informal agreements and wink-and-nod coffees,¹⁷⁷ meaning that the Supreme Court would not have to decide whether a lower judge who purports to follow a hiring plan actually does so. But, as explained above, the costs of a medical matching plan are high, meaning that anti-evasion device might not be available. The upshot would be that the Justices themselves would be forced to determine whether a judge who says he or she followed the plan really did. No wonder the Supreme Court isn't rushing to take on this role.¹⁷⁸

3. Congress as Enforcer

One clever proposal, pushed by Aaron Zelinsky, is to get Congress involved to stop regulation from unraveling.

Congress has the power of the purse. It allocates funds for building courthouses, keeping the lights on, and employing staff. For instance, law clerks are employed under 28 U.S.C. 752 (for district courts) and 28 U.S.C. 712 (for circuit courts). If the judiciary really wants to fix the hiring plan, then judges should request that Congress condition salaries for law clerks upon

176. See, e.g., Avery et al., *supra* note 32, at 876–77.

177. *Id.* at 883.

178. The Chicago-Harvard Study, as noted above, proposes using “randomization” in a modified matching system to prevent this problem. This would spare the Supreme Court the unpleasant chore, but with heavy costs of its own. See Avery et al., *supra* note 32, at 884.

them being hired in compliance with the judicial hiring plan. In other words, if you don't play by the rules, you don't have law clerks.¹⁷⁹

This proposal has much going for it. It understands the reality driving the Plan's collapse. Courts need a powerful force outside of the system to "tie them to the mast."¹⁸⁰ And Congress is a very powerful force.

Nonetheless, this too is a very costly proposal. The problems again come in at least two flavors. First, is this really the best use of Congress' time? Congress has a lot of important issues on its plate; it is hard to see why fixing this particular problem, limited to just the legal sector, is something that Congress ought to worry about. The supposed benefits of a hiring plan do not seem weighty enough to merit congressional involvement.

Second, it is not at all clear that congressional involvement would even solve the problem. The underlying dynamic driving early hiring would still exist. Judges would formally abide by the Plan, but the temptation to skirt the spirit of the law would not go away — again, think of coffees. Such casual meetings have been in formal compliance with the Plan, but everyone knew that a coffee could turn into an interview with a wink. The same sort of pattern could emerge again. A workable enforcement mechanism must be more than just a formal rule; it requires active monitoring of very subtle behavior. Congress is too busy for that sort of ongoing responsibility.¹⁸¹

B. The Search for a Quiet Life Will Not Justify Reform

Given the foregoing, it seems plain that a clerkship hiring plan is not cost-justified, at least given the benefits identified to date. This does not

179. Aaron Zelinsky, *Fixing the Judicial Clerkship Crisis*, HUFFINGTON POST (Jan. 30, 2013, 2:54 PM), http://www.huffingtonpost.com/aaron-zelinsky/fixing-the-clerkship-cris_b_2583485.html, archived at <http://perma.cc/CMH6-P4FB>.

180. *Id.*

181. See, e.g., Nielson, *supra* note 1, at 26. In a similar vein, Richard Epstein argues that the Administrative Office of the Federal Courts could create a list of judges who follow the Plan and make students decide ex ante whether to apply to judges on that list; if they decided to do so, they could not accept a clerkship from a judge not on the list. See, e.g., Epstein, *supra* note 152, at 46–47. This proposal is clever but also complex. Nor would it necessarily work. Without a method like randomization to prevent them, there would still be informal agreements.

mean that a plan would not be beneficial.¹⁸² It does mean that a plan, assuming it is beneficial, is not so beneficial that it justifies the costs of an enforcement mechanism that could actually work. In this world of scarcity, not everything that is good is good enough. Accordingly, the benefits of a “quiet life” are inadequate. Many judges may prefer an orderly hiring process. Such an orderly process may be more efficient, but the costs of obtaining and keeping order are too high.

As George Priest has explained, the unregulated market has problems, but it is not the end of the world.¹⁸³ Judges are pretty good at spotting talent, and by the time a student has finished the 1L year, there is a lot of data available to help in the selection process.¹⁸⁴ In any event, a hiring plan might very well make exploding offers worse, unless a medical match model were adopted, and that would carry heavy costs of its own.

C. The Need for a New Justification for a Hiring Plan

Because the costs of a working enforcement mechanism are so steep, the benefits identified to date do not appear to justify regulation. But might there be as-of-yet-unidentified benefits that could justify regulation? Looking at the fruits of the unregulated market, this portion of the Article identifies three such potential benefits: increased diversity, greater cultivation of local talent, and better judicial outcomes. Obviously, these are just thought experiments. Nonetheless, unless such new benefits or others like them can be empirically demonstrated, it is hard to see another plan getting off the ground.

1. Law School Asymmetries

The most compelling of these potential new arguments is the impact that an unregulated market might have on whom becomes clerks. For instance, some research suggests—although the data is mixed, and at least one recent article suggests that things may be improving—that women, at some schools, on average do less well during the 1L year, but

182. To be sure, there is a compelling argument that a hiring plan is not a good thing—not just that it is not cost-justified. Indeed, if the actions of the federal bench were copied by private litigants, they might violate the Sherman Act. See Pletcher & Ghesquiere, *supra* note 73, at 190–91. More likely, the benefits are mixed. A plan hurts some and helps others.

183. See Priest, *supra* note 7, at 127–28.

184. *Id.* at 163–76.

the divergence dissipates in subsequent years.¹⁸⁵ The first-year curriculum may be working poorly at many institutions, with asymmetric results. If so, making hiring more dependent on 1L grades might have a negative impact on the composition of the hiring pool, at least at the margins. Such asymmetries would be an obvious problem, not just for clerkship hiring, but for the legal academy in general. If this data is confirmed then the legal profession itself has a serious problem.

2. Fostering Local Talent

The unregulated market should benefit higher-ranked schools. As explained above, the earlier hiring occurs, the more important an applicant's brand becomes.¹⁸⁶ Might this be a problem? If those who are getting clerkships increasingly hail from the very top law schools, it is possible that local legal communities may suffer as clerks come and then leave, never to return. Local schools will not produce as many clerks, and clerks tend to be the stock from which local leaders of the bar emerge.

An example is Utah's newest federal appellate judge, Carolyn McHugh. Judge McHugh graduated from law school in Utah, clerked in Utah, practiced in Utah, became a state judge in Utah, and then joined the Tenth Circuit.¹⁸⁷ By any measure, she is a leader of the bar. The danger is that someone like Judge McHugh would not as readily emerge in a world where students from the top law schools obtain even more clerkships and then leave for larger cities to practice. To be sure, the danger should not be overstated; many prominent lawyers and judges do not clerk; students who attend top schools can move to more distant

185. Compare, e.g., Allison L. Bowers, *Women at the University of Texas School of Law: A Call for Action*, 9 TEX. J. WOMEN & L. 117, 134–36 (2000) (offering data suggesting that women do worse on average than men as 1Ls), with Shannan N. Ball, Note, *Separate But Equal Is Unequal: The Argument Against an All-Women's Law School*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 171, 181–82 (2001) (“Less than one percent of the variance in first year grades can be explained by gender. One-half of women earned first year grade point averages above the class mean at their school. . . . [W]omen are holding their own and, in many instances, outperforming their male counterparts.” (footnotes omitted)), and Lauren A. Graber, *Are We There Yet? Progress Toward Gender-Neutral Legal Education*, 33 B.C. J.L. & SOC. JUST. 45, 54 (2013) (noting studies showing grade differences but also stating that “it is clear that there is no meaningful difference between men and women in their average GPA after the first year of law school at BC Law”).

186. See Stras, *supra* note 128, at 154 tbl.1.

187. See Judge Carolyn B. McHugh, U.S. CT. OF APPEALS FOR THE TENTH CIRCUIT, <https://www.ca10.uscourts.gov/judges/judge-carolyn-b-mchugh> (last visited Nov. 2, 2014), archived at <http://perma.cc/9QZW-MABC>.

markets or stay where they clerk; and judges will still hire some clerks from schools other than the highest ranked. But it is possible that reducing the number of clerkship slots available to other schools may have at least *some* ill effects on local markets.

3. Justice

Finally, is it possible that the unregulated market creates worse judicial outcomes? As explained above, those who get clerkships, especially in an unregulated market, tend to be those with great 1L grades at the top law schools.¹⁸⁸ Is there something about that group—which perhaps contains a lot of “Type A” personalities—that may produce bad outcomes for litigants? And is this something that judges aren’t catching? A few years ago, an amusing article suggested that hiring Yale students as clerks is a recipe for reversal.¹⁸⁹ Here, to justify a plan, it would take something like this but less tongue-in-cheek. Needless to say, this prospect seems far-fetched, especially if the judge is doing his or her job properly.

D. Less Costly Alternatives

Even if these three potential benefits could be shown, it would not necessarily follow that a new plan is justified. The costs of a working enforcement mechanism would still be substantial. This means that if the benefits could be achieved at lower cost, regulation might not be the right call. Here, there may be just such alternatives: the rise of alumni hiring and greater transparency. These trends, likewise, should make the unregulated market more acceptable even for those who seek regulation for reasons traditionally given (i.e., efficiency and decorum).

1. More Graduate Hiring

The last decade has seen a marked increase in applicants who have

188. See *supra* Part IV.B–C.

189. See Royce De Rohan Barondes, *Want Your Opinions Reversed? Hire a Yale Clerk (and Don't Require the Bar)* (Univ. of Missouri–Columbia Sch. of Law Legal Studies Research Paper Series, Paper No. 2008-8), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1116343, archived at <http://perma.cc/D2HH-5M6R>. But see John Donohue, *Why I'd Stick with Yale Clerks—Some Econometric Ruminations*, BALKINIZATION (Apr. 22, 2008), <http://balkin.blogspot.com/2008/04/why-id-stick-with-yale-clerks-some.html> (last updated Sept. 28, 2008), archived at <http://perma.cc/9WNW-JQZB> (casting some doubt on the study).

graduated at the time of application.¹⁹⁰ As set forth above, some of this was driven by the Plan's graduate loophole, which exempted such hiring from regulation.¹⁹¹ Some also likely resulted from the economic downturn which hit the legal market hard, including at big law firms.¹⁹² There may be other reasons for it as well. The upshot, however, is that it no longer is considered unusual to hire (or be) a clerk with some practice experience. Many judges actually prefer such clerks.¹⁹³

This trend towards hiring "late" has the potential to mitigate, at least somewhat, the hiring "early" problem. For instance, the inefficiency associated with hiring a law student early in his or her academic career does not exist when the applicant has already graduated. The judge can look at not only two years of grades but three. Those who wish the Plan had succeeded on grounds of efficiency should welcome this development: if the problem is insufficient information, three years are better than two. Likewise, graduate hiring need not be as rushed, thus reducing the incentive for exploding offers and the like. A graduate too may have more leverage in negotiating with a judge because she often already has a job, and so may be more willing to turn down an exploding offer. Both of the main concerns about unregulated hiring, in other words, are mitigated.

These are not the only potential benefits. Graduate hiring can also mitigate the potential new problems sketched out above. For instance, if it is true that women on average are disproportionately impacted by a focus on 1L grades, then graduate hiring could be especially beneficial for them. Judges can look at an entire transcript to make a hiring decision. Of course, graduate hiring is no silver bullet. A colleague notes that it may be relatively more difficult for a woman to move to a far-off city to clerk after having already started at a law firm. For example, a female associate anticipating the need for parental leave prior to making partner might feel less free to take a year to clerk, especially in a market away from her firm. That undoubtedly is true. But if graduate hiring is on the rise, it stands to reason, all else being

190. See Lat, *supra* note 84.

191. See *supra* Part III.D.

192. See, e.g., Sherry Karabin, *Choosing the Path to Judicial Clerkship*, CHI. LAW. (Aug. 1, 2011), <http://www.chicagolawyer magazine.com/Archives/2011/08/clerkstory-08-2011.aspx>, archived at <http://perma.cc/D3G6-MX24> ("The impact of the economic downturn is being felt in all job sectors, including the courts. The poor economy is leading to an overabundance of applicants for clerkships, even more so than in the past.").

193. See Collins, *supra* note 20.

equal, that it is likely that more women should be hired than if the all clerkship hiring occurred in a set, orderly manner in the fall of the 3L year. The same sort of analysis applies to the brain drain and Type A problems. If judges hold off hiring, they can hire local talent with greater confidence. The advantage that Type A students have should also be reduced. Needless to say, the precise strength of this mitigation is an empirical question beyond the scope of this Article.

Some judges, of course, do not want to wait until after graduation.¹⁹⁴ This is understandable; some judges worry about clerks picking up bad habits in practice.¹⁹⁵ And all else being equal, many students would prefer to nail down a clerkship while still in school, if only to minimize the logistical difficulty of moving around after having already started a job. (Law firms, of course, also would prefer it when young associates finish clerking before starting at the firm.) Nonetheless, this trend towards graduate hiring, even if not universally adopted, may be able to achieve many of the same benefits as regulation in a less costly way.

2. Increased Transparency

Another trend that may mitigate some problems associated with an unregulated market is the emergence of greater transparency. For decades, some have argued that providing more information to applicants is preferable to regulating when hiring can occur.¹⁹⁶ But finding information about judges and how they hire remains difficult. Now, however, well into the Internet age, applicants are finally beginning to obtain access to real information. This access to information is also no silver bullet (for instance, it does little if anything to address the issue of clerks being hired too early). But it can make an unregulated clerkship market more palatable.

The benefit of increased transparency is that applicants will have a better sense beforehand whether they want to clerk for a particular judge. Applicants can learn about those judges who engage in untoward conduct and avoid them. Some applicants will apply anyway, even with more information, and some judges will not change how they behave, even if more people know about it. But at least some applicants will apply to judges whom they like more, and at least some judges will become more likable. The consequence is that the match between

194. See, e.g., Sloan, *supra* note 35.

195. See *id.*

196. See, e.g., Kozinski, *supra* note 10, at 1728.

clerks and judges should improve and the amount of bad behavior should decrease.

Efforts to collect and publicize information about the hiring process should be encouraged, especially now when it could be done more easily. Alas, many of the online efforts to increase transparency have stalled; the *Law Clerk Addict* website (which hosted anonymous tips about the hiring process), for instance, appears to have fallen silent. This is unfortunate, but unsurprising. Someone has to keep the system running, but it is hard to stay interested in clerking once you have a clerkship.

What we need, therefore, is a third party that can collect and evaluate information, and that will not go away. Although operating in a different context, the Better Business Bureau (BBB) is a good model. It receives information, evaluates it, seeks clarification, and then publicizes.¹⁹⁷ Because the BBB has its own reputation to worry about, it does its best to present accurate information to the public. This process is not perfect, but it often works well. Why can't there also be such an organization in the clerkship market? This seems like a great project for an entrepreneur — some stable third-party with a reputation to protect.

VI. CONCLUSION.

Much has been written about the clerkship market. The Plan's collapse was predicted long before it occurred because the underlying market dynamic is neither new nor especially complicated. Antitrust scholars have taught for decades that it is difficult to use collective action to move away from a market equilibrium. This is especially true in a market like the one that characterizes the federal judiciary. This is not a new insight, but it is one that bears repeating until it is understood. Collusion, no matter the motive, is a hard thing to sustain.

With this reality in mind, what will law clerk hiring look like in the future? There is good reason to think that it will look a lot like it does today. The costs of an enforcement mechanism that could hold collective action together do not appear to justify the benefits, at least given the cost and benefits identified to date. There also is reason to think that other potential regulatory benefits can be achieved through less costly means, especially if judges continue to hire applicants who

197. For information about the BBB, see COUNCIL OF BETTER BUSINESS BUREAUS, <http://www.bbb.org/council/about/>, archived at <http://perma.cc/K6PZ-5FBR> (last visited Nov. 2, 2014).

have already graduated and more information about judges becomes available online. It is not “fatalism”¹⁹⁸ to say that sometimes the game just isn’t worth the candle.

198. Avery et al., *supra* note 32, at 885.